(11) (12)

No. 98-791, 98-796

**IN THE SUPREME COURT OF THE UNITE**

J. DANIEL KIMEL, JR., et al.,
*Petitioners,*

v.

STATE OF FLORIDA BOARD OF REGENTS, et al.,
*Respondents.*

UNITED STATES OF AMERICA,
*Petitioner,*

v.

FLORIDA BOARD OF REGENTS, et al.,
*Respondents.*

---

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF OF *AMICI CURIAE* STATES OF OHIO AND TENNESSEE AND CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, KANSAS, LOUISIANA, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, OKLAHOMA, OREGON, RHODE ISLAND, UTAH, VERMONT AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF RESPONDENTS

PAUL G. SUMMERS
Attorney General and
Reporter of Tennessee
MICHAEL E. MOORE
Solicitor General
Cordell Hull Building
Nashville, Tennessee 27343
(615) 741-3491

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
STEPHEN P. CARNEY*
Associate Solicitor
**Counsel of Record*
MATTHEW J. LAMPKE
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for *Amici States*

43 pp

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

THURBERT E. BAKER
Attorney General
State of Georgia

EARL I. ANZAI
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

CARLA J. STOVAL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

ANDREW KETTERER
Attorney General
State of Maine

JENNIFER M. GRANHOLM
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JOHN J. FARMER, JR.
Attorney General
State of New Jersey

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

D. MICHAEL FISHER
Attorney General
Commonwealth of
Pennsylvania

SHELDON WHITEHOUSE
Attorney General
State of Rhode Island

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

MARK L. EARLEY
Attorney General
Commonwealth of Virginia

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**PAGE**

**Cases**

**Statutes and Other Authorities**

## STATEMENT OF *AMICI* INTEREST

The States of Ohio, Tennessee and 21 other *amici* States urge the Court to affirm the judgment below. In doing so, they join both Florida and Alabama in this case, as well as at least two other states—New Mexico and New York—that have independently asked the Court to similarly protect the States' immunity. *See Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), petition for cert. pending, No. 98-1178; *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998), petition for cert. pending, No. 98-1524. At issue is whether the States' Eleventh Amendment immunity from money-damages suits was abrogated when Congress enacted the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.* Subsumed in the issue are two questions: whether Congress *expressed* an unmistakably clear intent to abrogate the States' immunity, and if so, whether it had the *power* to do so under Section 5 of the Fourteenth Amendment.

As this Court reaffirmed just this past Term, under our federalist Constitution the States "retain 'a residuary and inviolable sovereignty,'" and are "not relegated to the role of mere provinces or political corporations." *Alden v. Maine*, 119 S.Ct. 2240, 2247 (1999). As sovereigns, the States have a vital interest in ordering their own affairs—particularly their management of the internal machinery of State governments—without the undue interference of being haled into federal court and forced to explain, at great cost, each and every employment decision they make.

The States share many concerns about such ADEA suits generally, and about the type of ADEA suits at issue here in particular, for reasons of both purse and principle. At the most concrete level, the States face considerable costs in defending these cases, even if they win, along with the potential and actual costs of damages and attorney fees if they lose. But more importantly, the States seek to ensure

that their constitutional sovereign immunity is overridden by Congress only when Congress truly acts to remedy constitutional violations *by the States*. The States' unique status as sovereigns is not honored if Congress may override States' immunity by pointing to alleged constitutional violations by private or non-State governmental actors—yet that is all that the relevant legislative record shows here.

In defending their sovereign immunity against one aspect of the ADEA—money-damages suits in federal court—the States emphatically do not question the ADEA itself, nor its goal of eradicating age discrimination. To the contrary, the States have been leaders, not followers, in protecting their own employees, as well as citizens in the private sector, from age discrimination. Indeed, it is in part because States have actively prevented, rather than committed, age discrimination that Congressional abrogation is unwarranted here. But if the States are to continue to act as laboratories of democracy, as they did when many preceded the federal government in outlawing age discrimination, and as they continue to do in everything from education to welfare reform, they must not be hamstrung by the threat of suit whenever they act, but must instead maintain the flexibility that attends their sovereignty.

All of this ultimately furthers the transcendent goal of federalism, reflecting our national belief that individual liberty is most effectively secured by dividing the country into federal and State governments, each with well-preserved and separate sovereign powers. In the interest of preventing the dilution of these critical principles, the *amici* States submit this brief for the Court's consideration.

## SUMMARY OF ARGUMENT

The ADEA does not contain an unmistakably clear, unequivocal and textual expression of congressional intent to abrogate the States' Eleventh Amendment immunity. Because the States are powerless to correct judicial misapprehensions of Congress's intent to abrogate, strict enforcement of the so-called "clear-statement" rule is essential to safeguard the States' constitutionally secured immunity from suit in federal court. The States therefore respectfully urge this Court to reject petitioners' invitation to relax the standards of clarity and specificity required by such cases as *Dellmuth v. Muth*, 491 U.S. 223 (1989), *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Employees of the Dep't of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973).

None of the statutory provisions from which petitioners would have this Court divine an intent to abrogate are sufficiently explicit under these prior cases. First, Congress's 1974 decision to subject the States to the substantive provisions of the ADEA does not supply the required clear statement. Although Congress expanded the ADEA's definition of "employer" to include the States at that time, Congress neither inserted the word "employer" into 29 U.S.C. §626(c), which is the source of the right to bring a private enforcement action under the ADEA, nor otherwise amended the Act to address, even indirectly, the topic of the States' sovereign immunity.

Petitioner's reliance upon the ADEA's cross reference to §216(b) of the Fair Labor Standards Act of 1938 ("FLSA") (29 U.S.C. §216(b)) is similarly unavailing. Under this Court's clear statement jurisprudence, the required expression of an intent to abrogate must appear "in the statute itself" (*Atascadero State Hosp.*, 473 U.S. at 243), in other

words, within the provisions of the ADEA. Congressional intent to alter through abrogation the fundamental balance of our federal system should not be inferred from a mere reference to the terms of another, wholly separate and distinct, statutory scheme. Moreover, even if the words of §216(b) of the FLSA are read verbatim into the ADEA, as petitioners insist they must be, those words subject employers to private actions in federal court only for violations of the FLSA's minimum wage and hour and retaliatory discharge provisions. The language of §216(b) does not subject State employers (or any other category of employer for that matter) to suit in federal court for violations of the ADEA.

Nor did Congress have the *power* to abrogate the States' Eleventh Amendment immunity. Congress can abrogate only to remedy unconstitutional State action, so Congress must first identify a predicate "pattern of constitutional violations" by the States. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199, 2206-07 (1999). But the legislative history--both in 1967 when Congress enacted the ADEA and in 1974 when Congress added State employees to its coverage--contains not a single identified violation, let alone a pattern. The 1967 record shows evidence of private sector age discrimination, but does not show any *State* discrimination. Quite to the contrary, the record shows that States led the way in protecting their own employees, as well as private sector employees, from age discrimination. Indeed, the federal government looked to the States as a model in enacting the ADEA .

Congress extended ADEA coverage to the States on perhaps several different bases, but none of those bases involved age discrimination by States. The stated basis for applying the ADEA to States was that it was a "logical

extension" of Congress's decision to extend economic legislation–the Fair Labor Standards Act–to the States. Congress did review evidence of governmental age discrimination–but that concerned *federal*, not State, discrimination. And Congress apparently had a general notion that public and private employees should enjoy the same standards of protection. But none of these concerns raise the specter of unconstitutional age discrimination.

Even if a minimal predicate were presumed, the ADEA's restrictions on the States go far beyond guaranteeing constitutional protections. The ADEA subjects State employment decisions to exacting scrutiny, prohibiting a wide sweep of policy choices that are undoubtedly constitutional. The narrow exception ADEA offers for "bona fide occupational qualifications" is much more demanding than the constitutional rational basis test that would otherwise apply. And ADEA suits intrude on more than strictly employment decisions, as almost any policy choice can be alleged to have a "disparate impact" on older employees – such as the Florida Board of Regents' choice here to allow State universities flexibility in spending their budgets. This suit is just one example of the broad and deep reach of the ADEA.

Because Congress had neither the power nor the express intent to abrogate state sovereign immunity when it passed the ADEA, the Eleventh Amendment bars this suit, and the judgment below should be affirmed.

## ARGUMENT

The States' sovereign immunity is essential to our federalist system of government, and as such, it should not be—and cannot be, under the Court's plain rules—abrogated

lightly. Several principles help to cabin Congress' power to abrogate the States' immunity, and to guide the Court in not too easily inferring abrogation. Applying these principles shows that in extending the coverage of the ADEA to cover States as employers, Congress neither expressed the intent nor had the power to abrogate the States' sovereign immunity.

## I. THE ADEA DOES NOT CONTAIN AN UNMISTAKABLY CLEAR, TEXTUAL EXPRESSION OF AN INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

This Court should decline petitioners' invitation to retreat from its historical insistence upon an "unmistakably clear" (*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)), "unequivocal and textual" (*Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)) expression of congressional intent to abrogate the States' Eleventh Amendment immunity "in the statute itself." *Atascadero State Hosp.*, 473 U.S. at 243. The "clear-statement" rule is more than a mere "rule of construction," as the United States would have it. Brief for the United States ("U.S. Br.") at 12. Rather, its strict observance by Congress and vigilant enforcement by the federal courts are essential to protect from inadvertent encroachment "the States' constitutionally secured immunity from suit in federal court." *Atascadero State Hosp.*, 473 U.S. at 242. The rule has the salutary effect of directly focusing Congress's attention on "the vital role of the doctrine of sovereign immunity in our federal system" (*Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)) before it undertakes to alter "the fundamental constitutional balance between the Federal Government and the States" through abrogation. *Atascadero State Hosp.*, 473 U.S. at 238. At the same time, the rule protects the States against "judicial

misapprehension of that abrogation," which the States "are unable directly to remedy." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). The burden of compliance for Congress is negligible[1], while the dangers to state sovereignty threatened by any relaxation of the clear-statement requirement are substantial.

Petitioners urge this Court to discover in the ADEA an intent to abrogate, not from any unmistakably clear language to that effect in the text itself, but rather (1) based upon a chain of inferences that may be drawn from the interplay between two provisions of the statute (29 U.S.C. §§ 626(c) and 630(b)); and (2) based upon a reference contained in a third provision of the ADEA (29 U.S.C. §626(b)) to an entirely different statute (29 U.S.C. §216(b)). Neither route leads to its desired destination.

1. First, petitioners focus on the 1974 amendment to the ADEA, which expanded the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State." 29 U.S.C. §630(b). Petitioners further note that, since its original enactment in 1967, the ADEA has afforded to persons aggrieved by a violation of the Act the right to sue in federal court for redress: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this chapter . . . ." 29 U.S.C. §626(c). When the two

---

[1] *See, e.g., Florida Prepaid*, 119 S.Ct. at 2203 (1999), *quoting* 35 U.S.C. §296(a) ("Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court . . . for infringement of a patent.")

provisions are considered in tandem, petitioners reason, it must necessarily follow that the 1974 amendment supplied a clear statement of congressional intent to subject the States to suits by private persons in federal court for violations of the ADEA: "In extending the ADEA to the States in 1974, therefore, Congress placed States as employers squarely within an existing enforcement scheme that specifically and expressly contemplated suits by employees against employers in federal court." U.S. Br. at 14.

The expanded definition of "employer," even when read together with §626(c), falls far short of the standard of clarity demanded by this Court's prior cases. The basic flaw in petitioners' reasoning is that the word "employer" nowhere appears in §626(c). It cannot be disputed that §626(c) has from the beginning conferred a right to bring a civil action in federal court for redress of grievances under the ADEA. And, given the subject matter of the ADEA, it may be assumed that, when Congress enacted §626(c) in 1967, "employers" were the intended target of the suits contemplated by that provision. But, when Congress amended the definition of "employer" in 1974 to include the States, it neither amended §626(c) to insert the word "employer" nor made any other change in the text of the ADEA to address, even indirectly, the subject of the States' sovereign immunity. While it no doubt may be inferred from the 1974 decision to subject the States to the substantive requirements of the ADEA that Congress may also have supposed that States too could now be sued under §626(c), the fact remains that Congress nowhere made a statement to that effect in the text. While Congress need not use particular "magic words" to exercise its powers of abrogation, this Court has traditionally required an explicit, textual statement of some description in order to override the protections of the Eleventh Amendment. "[A] permissible inference, *whatever its logical force*," cannot qualify as "the

unequivocal declaration which . . . is necessary before [this Court] will determine that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U.S. at 232 (emphasis supplied).

Indeed, §626(c) of the ADEA would still fall short of the clarity required by this Court's prior decisions, even if it expressly authorized suit against an "employer." That is the teaching of *Employees of the Dep't of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973). In *Missouri*, as here, the definition of "employer" in the Fair Labor Standards Act of 1938 had originally excluded the States, but the statute was later amended to cover certain state hospitals and related institutions. In contrast to the ADEA, however, the statutory scheme involved in *Missouri* expressly rendered an "employer" liable to an "employee" for violations of the statute and authorized actions "to recover *such* liability" in courts of competent jurisdiction. 411 U.S. at 283 (emphasis supplied). While, based on these provisions, this Court harbored "no doubt that Congress desired to bring under the Act employees of hospitals and related institutions" of the States, the Court nevertheless held that the statutory scheme was insufficiently explicit to "lift the sovereign immunity of the States" from private enforcement actions in federal court. 411 U.S. at 285.[2]

2. Nor does the immediately preceding subsection of the ADEA—29 U.S.C. §626(b)—supply the

---

[2]*See also Atascadero State Hosp.*, 473 U.S. at 242-47 (provisions of the Rehabilitation Act of 1973 authorizing suit against "any recipient of Federal assistance," coupled with implementing regulations expressly defining the class of recipients to include the States, constitute insufficient expression of intent to abrogate).

unequivocal expression of an intent to abrogate plainly lacking in the text of §626(c). Petitioners wish to find that expression through §626(b)'s reference to §216 of the Fair Labor Standards Act of 1938 ("FLSA"):

> The provisions of this chapter [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), *216* . . ., and 217 of this title, and subsection (c) of this section.

29 U.S.C. §626(b) (emphasis supplied). In turn, §216(b) of title 29 provides, in pertinent part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and payment of wages lost and an additional equal amount as liquidated damages. *An action to recover the liability prescribed in either of the preceding sentences* may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for

> and in behalf of himself or themselves and other employees similarly situated . . . .

29 U.S.C. §216(b) (emphasis supplied). Because §216(b) of the FLSA expressly authorizes suits against "any employer (including a public agency) in any Federal . . . court . . . ,"[3] petitioners argue that the ADEA's reference in §626(b) to §216 provides the clear statement they seek of Congress's intent to authorize private suits under the ADEA against State employers in federal court.

But the argument wholly ignores the requirement that effective language of abrogation must appear "in the statute itself." *Atascadero State Hosp.*, 473 U.S. at 243. The language upon which petitioners rely appears in the FLSA, not in the ADEA. This Court has never suggested that a mere reference in one statute to a provision in another can qualify as an unmistakable expression in the text of the former of congressional intent to abrogate the States' immunity from suit under that statute. As this Court has cautioned, Congress should not be presumed to have undertaken the serious business of abrogation—an action that disturbs "the fundamental balance between the Federal Government and the States"—by dropping "coy hints" of its intention to do so. *Dellmuth*, 491 U.S. at 231.

It is no answer to this objection that §626(b)'s reference to §216 may be said to "incorporate" that section of the FLSA verbatim into the ADEA. By its express terms, §216(b) authorizes actions "against any employer (including

---

[3] "Public agency" is elsewhere defined in the FLSA to include "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State . . ." 29 U.S.C. §203(x).

a public agency)" *only* "to recover the liability prescribed in either of the preceding sentences" of §216. Those two "preceding sentences" create employer liability for violations of the minimum wage and hour provisions of the FLSA (29 U.S.C. §§206, 207) and for violations of the FLSA's retaliatory discharge prohibition (29 U.S.C. §215(a)(3)). Those two sentences do not prescribe any liability for violations of the ADEA.

Thus, the very words of §216(b) from which petitioners seek to construct their "clear statement" belie any claim that §626(b)'s incorporation of them has subjected the States to private enforcement actions in federal court under the ADEA. If §626(b)'s reference to §216 "makes [§216(b)] as much a part of [the ADEA] as though it had been incorporated at full length" (U.S. Br. at 15 n. 15, *quoting Engel v. Davenport*, 271 U.S. 33, 38 (1926)), then every word of §216(b), not just a selective abridgement thereof, must be considered. The words chosen by Congress—all of the words—are indeed quite clear, and none of them authorizes suit against State employers (or against any other employer for that matter) for violations of the ADEA. The source of the private right of action under the ADEA is §626(c), and, as set forth above, §626(c) does not contain any clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity.

## II. THE ADEA IS NOT APPROPRIATE REMEDIAL LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Congress is empowered by Section 5 of the Fourteenth Amendment to "*enforce*, by appropriate legislation, the provisions" of the Amendment. In a word—*enforce*—Congress's power was limited even as it was being broadened. Thus, Congress's remedial power to

*enforce* constitutional rights, which is broad, has always been distinguished from the power to *define* those rights, which is fully beyond Congress's reach. *Florida Prepaid*, 119 S.Ct. at 2202; *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997); *Civil Rights Cases*, 109 U.S. 3 (1883). As the Court explained in *City of Boerne*:

> *Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.* Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

*City of Boerne*, 521 U.S. at 519 (emphasis supplied). Even where Congress steers clear of redefining rights, but acts solely to enforce them, its enforcement power is limited by Section 5 to enacting only *appropriate* legislation.

First, the remedial power is triggered only by *factual evidence* of a pattern of constitutional violations: Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 530-31; *EEOC v Wyoming*, 460 U.S. 226, 260 (1983) ("Congress may act only where a violation lurks")(Burger, C.J., dissenting). The Court properly defers to Congress' ability to evaluate the facts it finds, but such deference does not relieve Congress of the duty to find *facts*: anecdotes and assertions of protecting "constitutional values" are not enough. *See City of Boerne*, 521 U.S. at 530-31 (dismissing anecdotes); *compare* H.R. Rep. No. 88, 103rd Cong., 1st Sess., at 9 (1993) (RFRA's proponents claimed that Section 5 authorized Congress "to provide statutory protection for a constitutional *value* when

the Supreme Court had been unwilling to assert its authority") (emphasis supplied). Moreover, those facts must constitute a pattern, not an instance or two, *see Florida Prepaid*, 119 S.Ct. at 2207, and those facts must involve truly *constitutional* violations, not perfectly constitutional acts that Congress might seek to outlaw. *City of Boerne*, 521 U.S. at 530-31 (emphasis of RFRA hearings was on laws that met constitutional standards).

Second, even when Congress may act to remedy violations, it is not given a blank check, but must act in proportion to the wrongs it finds: Congress "must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 520. ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). This tailoring rule, rooted in Section 5's limit of "appropriate legislation," is as time-honored as it is essential to holding the line between enforcing and defining rights. *See Civil Rights Cases*, 109 U.S. 3, 13 (1883) (Section 5 legislation must "be adapted to the mischief and wrong which the Amendment was intended to provide against"); *City of Boerne*, 117 S. Ct. at 2164 (requiring "congruence and proportionality"). If no tailoring were required, the enforcement-only limitation would have no meaning, as a Congress that failed to find violations in one area could simply point to any slight violation in another field to justify power over both areas and more.

The extension of the ADEA to the States fails on both counts. No constitutional violations precipitated the extension, and the strictures of the Act go far beyond anything required by the Constitution.

### A. Congress Found No Evidence Of Unconstitutional Age Discrimination By The States When It Extended The ADEA To Cover State Employment In 1974.

1. The ADEA was not enacted nor extended to the States, to remedy unconstitutional age discrimination. When Congress passed the ADEA in 1967, it applied only to private sector employment; and State, local, and federal employees were all excluded. The legislation was preceded by extensive hearings and reports regarding the prevalence of age discrimination in the private sector. *See EEOC* v. *Wyoming*, 460 U.S. at 229-33. But in all of these investigations, it seems that there was not a *single* mention of States as employers at all, let alone as discriminatory ones.

By contrast, the federal government looked to the States, which had already paved the way in outlawing age discrimination in employment, for advice and as models of how to best implement antidiscrimination policies. *See The Older American Worker: Age Discrimination in Employment* (1965) (Labor Report), *reprinted in* Equal Employment Opportunity Comm'n (EEOC), *Legislative History of the Age Discrimination in Employment Act* 16-41 (1981), at 9-10 ("As part of the preparation for this report, a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to see their views on the effectiveness of such legislation.") The Secretary of Labor's 1965 report devoted a section to State laws, entitled with the observation that "[a]rbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age." *Id.* at 9. Almost half of the States had such laws at the time, with some dating back

decades earlier and most covering private and State employees alike. *Id.*; *see, e.g.*, N.J. Stat. §52:14-11 (1938); R.I. Gen. Laws 28-6-1 (1956). The Secretary praised both the intent and the effectiveness of such State laws, noting as a drawback not the States' intent or commitment, but that limited resources prevented States from doing more, demonstrating why federal action was needed. *The Older American Worker* at 10.

2. Years later, Congress still had not identified any unconstitutional State discrimination when it extended ADEA coverage to include federal, State, and local employees as part of the Fair Labor Standards Act ("FLSA") Amendments of 1974. The bulk of the hearings and reports on the bill concerned the FLSA provisions, governing minimum wage, overtime pay, and the like. The ADEA itself had been modeled on the FLSA in 1967, and the consensus was that the ADEA amendment was "a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local employees." S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974) (same).

The legislative record on this ADEA amendment is sparse, and the little there is demonstrates that not only was there no evidence of State constitutional violations, but also that neither State action (unconstitutional or not) nor constitutional violations (by States or others) was a focus of Congress' attention. One apparent focus of Congress' attention, and perhaps a prime impetus for Congress' actions, was Congress' recognition that the *federal government* itself did not practice what it preached regarding age discrimination. In introducing the original standalone bill in 1972, Senator Bentsen cited several examples of federal government discrimination: "there is very disturbing evidence to suggest that the *Federal Government* . . . may be

a leading offender in applying pressure tactics to coerce older workers to retire at an early age." 118 Cong. Rec. 7745 (1972) (emphasis supplied). *See also* S. Rep. No. 93-846, at 112 (1974) (finding that in *federal* government employment, "older employee[s] had been singled out for reduction-in-force action; that the emphasis on early retirement placed an unequal burden on middle-aged workers; and in certain training programs youth is emphasized in determining eligibility"). As to the federal government, Senator Bentsen relied on more than just anecdotes or rhetoric, citing a recent committee report on federal government practices. *Id., citing* Senate Special Comm. On Aging, 92d Cong., 2d Sess., *Cancelled Careers: The Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees* ("Comm. Print 1972"); *see also* Senate Special Comm. On Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law* (Comm. Print 1973).

In all of the committee reports, hearings, and other records leading up to 1974 amendments, the sole *mentions* of State age discrimination were some cursory comments by Senator Bensten. Introducing his bill in 1972, Senator Bensten began by asserting "mounting evidence that employees of Federal, State and local governments" experience discrimination, but he went on to discuss *federal* discrimination at length. He mentioned States only one more time, commenting that "[l]etters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees." 118 Cong. Rec. 7745 (1972). In the 1974 floor debate, Senator Bensten again cited "letters from State and local employees." *See* Legislative History of the Fair Labor Standards Amendments of 1974, Senate Committee on Labor and Public Welfare (Comm. Print 1976) Vol. II at 1955 (floor debate on S. 2747, Mar. 7, 1974). Aside from these comments—and even assuming the "letters" comments to reflect evidence—the

record is bereft not only of another shred of *evidence* of any State age discrimination, let alone a constitutional problem, but the record also lacks even another rhetorical assertion of such a problem.[4]

On this "record," then, it should be safe to say that in "enacting the [ADEA amendments], Congress identified no pattern of [age discrimination] by the States, let alone a pattern of constitutional violations." *See Florida Prepaid*, slip op. at 2207. Indeed, despite any superficial notion that age discrimination is closer to equal protection concerns than the Patent Remedy Act is to due process, the ADEA record here stands on even weaker ground than did the Patent Remedy Act. Congress did not identify even *two* examples of State age discrimination, *cf. id.*, nor even hold up one extended example of a State employee alleging discrimination. *Cf. id.* at *15 (Stevens, J. dissenting) (noting specific testimony about the patent case of Marian Chew). And surely an unspecified reference to constituent letters carries no more weight than the anecdotes rejected in both *Florida Prepaid* and *City of Boerne*. *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 532.

The legislative record not only fails to reveal evidence of violations by States, but it also fails to demonstrate that Congress was concerned with *constitutional*

---

[4] As in 1967, the legislative record from 1967-1974 does not mention the State as employers, but the record notes the growing number of States that outlawed age discrimination—including in State employment—before the 1974 amendments were passed. See 118 Cong. Rec. 7745 (1972) (Sen. Bentsen); Secretary of Labor, *Age Discrimination In Employment Act of 1967* (1972) (annual report) at 6, 18-29 (Table 7); *See* Appendix A.

violations at all. To be sure, Senator Bentsen did once invoke "the principles underlying" then-recent legislation extending Title VII to public employees, but those principles are a matter of policy as well as constitutional law. And other comments suggest that Congress and the President simply thought that providing age discrimination coverage to State employees was good social policy, and that "age-ism" should be eradicated the same as racism or other "isms." H.R. Rept. No. 93-913, 93rd Cong., 2d Sess., *reprinted at U.S. Code Cong. & Admin. News* (1974), 2811, 2849 ("Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status . . . it destroys the spirit of those who want to work and it denies the National [*sic*] the contribution they could make if they were working."). Further, any comparisons to other forms of discrimination were undercut by Congress' finding (regarding private sector, not State, practices) that age discrimination did not present nearly as stark a situation as race and sex discrimination did. *See* Senate Special Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law* III (Comm. Print 1973) (*Improving the Law*) ("There are no situations like the race cases . . . [n]or is there anything analogous to the equal pay sex discrimination cases").[5]

---

[5] One type of "equal treatment" concern raised by Congress was equality between private-sector and public-sector employees, but that classification not only receives minimal protection, but it does not even raise concerns of "invidious discrimination." Indeed, were this distinction a legitimate source of Section 5 power, *Seminole Tribe*'s rejection of Commerce Clause-based abrogation would be eviscerated. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Congress could simply regulate private behavior (regarding employment or otherwise) under its Commerce power, and

3. Consequently, Congress' power to remedy constitutional violations was not triggered at all by any Congressional findings, and nothing proffered by either Petitioner changes that result. The United States' heading on this point is telling: "Congress Determined, On An Ample Record, That Unconstitutional Discrimination Against Older Workers Is Sufficiently Widespread To Warrant Preventive And Remedial Legislation." U.S. Br. at 29. True to the heading, the United States recites extensive legislative history evidencing findings of "widespread" discrimination—by the private sector, and by the federal government, but *not by the States*. *Id.* at 29-39. The only State-specific "evidence" noted by either the United States or Kimel appears to be Senator Bentsen's comments, with his references to constituent letters.

The evidence of widespread societal or private-sector discrimination can not suffice, as that view flies in the face of not only logic but of *Florida Prepaid*. After all, the private sector is rife with patent infringement, and thousands of cases are filed each year. If Congress could surmise that States, as large employers, must reflect corporate practice in employment, then why not presume that States, as large enterprises, must surely infringe patents at the rate of more than eight a century? *Cf. Florida Prepaid*, 119 S. Ct. at 2210-2211.

Moreover, there are reasons to infer that States are *less* likely to discriminate than private-sector employers. First, the States have been leaders in establishing antidiscrimination laws in their role as regulators of the private sphere, and hypocrisy should not be the presumed

---

then invoke Section 5 to "equalize" across the public-private divide.

position without evidence. See Appendix A and B. Second, unlike private employers, State employment is largely covered by civil service rules, which are designed to drain employment decisions of everything but merit, and often require "cause" for dismissal, thus automatically removing age as well as other improper classifications from the equation.

Nor can Petitioners point to legislative records *after* 1974 to establish a factual predicate of unconstitutional discrimination. Normally, "[i]t is the intent of the Congress that enacted [the section] . . . that controls." *Oscar Mayer and Co. v. Evans*, 441 U.S. 750, 758 (1979), quoting *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977). Here, where the issue is not purely legislative intent, but the factual predicate available to Congress, data collected by *previous* Congresses might be considered. But post-1974 Congresses cannot retroactively justify purported Section 5 legislation, as "[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history." *United Air Lines, Inc. v. McCann*, 434 U.S. 191, 200 n. 7 (rejecting use of 1977 ADEA amendment history when construing sections passed previously).

Moreover, the 1977 record, even if considered, merely confirms that Congress did not uncover *constitutional* violations, but as in *City of Boerne*, addressed solely the type of constitutional behavior that the legislation would prohibit. In passing the 1977 amendments, Congress sought to statutorily *reverse* the result in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979), and other cases that upheld the constitutionality of mandatory retirement ages, by forbidding under ADEA that which was permitted under the 14th Amendment. House Select Committee on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human*

*Cost of Enforced Idleness* 38 (Comm. Print 1977) ("If mandatory retirement because of age–the final step in the practice of age discrimination–is not be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal".)

Despite this meager evidence, the United States urges that the record should suffice because the Court should defer to Congress' superior factfinding ability. U.S. Br. at 39. But this presupposes that *some* facts be found, so that the Court may defer to Congress' assessment of those facts. If the facts of a few patent suits could not suffice to trigger such extreme deference, then neither can the "evidence" of some purported constituent letters with nothing more.

Nor is such extreme deference mandated by the voting rights cases. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld Congress' suspension of literacy tests under Section 5 because such tests historically had been used to disenfranchise blacks. *See also City of Rome v. United States*, 446 U.S. 156 (1980) (refusing "to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from [undoing] or [defeating] the rights recently won by Negroes"). In sharp contrast, the Court has already noted that age discrimination does *not* carry the same type of history that is unfortunately well-founded regarding racial discrimination. *Murgia*, 427 U.S. at 313.

For all of these reasons, Congress had no evidence before it of constitutionally-impermissible age discrimination by any States when it extended the ADEA's coverage to all of the States. For this reason alone, the ADEA extension is

not legitimate Section 5 legislation, and the States' immunity should prevail.

### B. The ADEA's Restrictions Are Far Out Of Proportion To Constitutional Guarantees Against Irrational Age Discrimination.

1. The ADEA's strict limits on the use of age in employment decisions go far beyond what is required by the Fourteenth Amendment, and swept under the ADEA's prohibitions are wide ranges of constitutionally valid conduct. Thus, even if Congress had adequate cause to enact *any* remedy against the States regarding age discrimination, the ADEA is "so out of proportion to a supposed remedial or preventive object that [it] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Florida Prepaid*, 119 S.Ct. at 2207, citing *City of Boerne*, 521 U.S. at 532.

If the ADEA were designed to *enforce* existing constitutional protections, it would codify the "rational basis" standard of review, as legislative classification based on age is neither suspect nor quasi-suspect and therefore is subject only to "rational basis" scrutiny under the Equal Protection Clause. *Murgia*, 427 U.S. at 314; *Vance*, 440 U.S. at 97. But the ADEA goes further, and ratchets up the scrutiny applied to employment decisions in which age is a factor to a level essentially indistinguishable from the scrutiny applicable to decisions based on ethnicity or gender. By subjecting age-based classifications to a strict scrutiny standard, the ADEA attempts to substantively change the constitutional rights of those individuals protected by the ADEA by creating a new "suspect classification." That this sort of restructuring of constitutional rights is beyond Congress' power has been recognized by the Court since *Marbury v. Madison*, 5 U.S. 137 (1803).

As the Court stated in *City of Boerne*:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts. . . alterable when the legislature shall please to alter it." Under this approach it is difficult to conceive of a principle that would limit congressional power.

*City of Boerne*, 521 U.S. at 529, quoting *Marbury v. Madison*, 5 U.S. 137, 177 (internal citations omitted).

Even if the legislative history supported the notion that the ADEA's extension to the States was a response to discriminatory age limits set in the past, it was precisely such age limits that were held *not* to violate the Equal Protection Clause in *Murgia* and *Vance v. Bradley*. Thus, the ADEA cannot be regarded as an effort to "remedy" prior state violations of the Equal Protection Clause's rational basis test; rather, it "remedied" behavior well within constitutional bounds. *Cf. City of Boerne*, 521 U.S. at 535.

Nor can the ADEA be defended as merely codifying the rational basis standard, *see* U.S. Br. at 46, as the narrow defense allowed for "bona fide occupational qualifications" ("BFOQs") that are "reasonably necessary" is a far cry from rational basis. As this Court explained, presenting a successful BFOQ defense requires much more than offering a "rational basis" for an action. *See Western Airlines v. Criswell*, 472 U.S. 400, 421 (1985) (rational basis standard is "significantly different from that conveyed by the statutory

phrase 'reasonably necessary'"); *id.* at 422 ("rational basis standard is also inconsistent with" ADEA standard and BFOQ requirements).

Under normal rational basis review, a plaintiff must establish the invalidity of the challenged practice or law, and a reviewing court may hypothesize any rational justification for the government practice, whether it actually motivated the government actors or not. But to establish a BFOQ defense, an employer has the burden of proof, and it must prove that

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably *necessary* to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that *there is no acceptable alternative* which would better advance it or equally advance it with less discriminatory impact.

*Criswell*, 472 U.S. at 417 n.24 (emphasis supplied). This stringent standard is the stuff of strict scrutiny—"no acceptable alternative"—not of rational basis.

The chasm between constitutional standards and the ADEA is further demonstrated by the Court's decision that the federal government is free to impose stricter standards upon State and local governments as employers, forbidding the use of most mandatory age limits, even while the federal government continues to use such limits for federal

employees. *See Johnson v. Mayor of Baltimore*, 472 U.S. 353, 370-71 (federal civil service age limit is not proof of BFOQ for similar State employees). Assuming, of course, that such federal practice clears constitutional scrutiny, the States are plainly foreclosed from a wide range of practices that are open to the United States, and that would be *constitutionally* open to the States. This result – that the federal government remains able to choose policies that it forbade for the States under the ADEA – is particularly ironic in light of Congress's reliance on *federal* government age discrimination when it extended the ADEA to the States.

Moreover, Congress apparently understood that the ADEA standard it established was stronger than constitutional standards. After *Murgia* upheld the constitutionality of a mandatory retirement age in 1976, Congress amended the ADEA to expressly forbid most such age limits. Such now-forbidden limits would almost certainly survive constitutional scrutiny. *See Wyoming*, 460 U.S. at 260-61 (Burger, C.J., dissenting) ("Were we asked to review the constitutionality of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, we would reach a result consistent with Bradley and Murgia.")

2. The stricter limits of the ADEA intrude deeply into the operation of State government. Contrary to the United States' description of employment as "only" one narrow area of State activity, U.S. Br. at 49, the States' employment decisions necessarily involve *every* area of State government, as the State cannot act except through its agents. The ADEA dictates a core part of State action *within* every known field—education, health, corrections, law enforcement, etc.

The intrusion is greatly broadened and deepened by the reality of disparate impact suits. While the United States

correctly notes that the availability of such suits under the ADEA is still unsettled by this Court, U.S. Br. at 46 n.45, *Hazen Paper Co. v. Higgins*, 507 U.S. 604, 610 (1993), the reality is that the States face such suits constantly and must defend against them. *See Coger*, 154 F.3d 296 (6th Cir. 1998), cert. petition pending, No. 98-821. Indeed, this very suit involves disparate impact claims, *see* Petitioner Kimel's Brief ("Kimel Br.") at 8-9 n. 9, and similar suits have burdened many States. *See, e.g., Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 299 (6th Cir. 1998) (disparate impact claims), *cert. petition pending*, No. 98-821; *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 (3rd Cir. 1995) (State Job Services office sued for administering General Aptitude Test Battery for use in referring applicants to employers). And because the hallmark of immunity is relief from the burdens and indignity of suit, not merely from imposition of liability, it does the States little good to note the future possibility that such suits will be judicially abolished, after a quarter-century of States' facing them to varying degrees.

Moreover, the flexibility of disparate impact theory means that such suits can affect much more than typical hiring and firing decisions. For example, in *Blanciak*, the Pennsylvania Jobs Office was sued along with private employers under the ADEA, and the plaintiffs alleged that the Jobs Office discriminated by administering the General Aptitude Test Battery in order to match employees and employers. *Blanciak*, 77 F.3d at 693. While such testing would easily survive Equal Protection review, *see Washington v. Davis*, 426 U.S. 229 (1976), it apparently may open the State to ADEA litigation, thus deterring the use of such tests and causing the State employment agency to use some other, perhaps less appropriate, tool to serve its citizens in job placement.

Even more broadly, disparate impact suits cast a shadow not only on State employment practices, but threaten States' ability to decide basic issues of budgeting, and even to determine the fundamental structure and execution of government functions. Indeed, the facts of this case illustrate the breadth and depth of the impact of ADEA suits on government decisions. The Florida Board of Regents was sued for what is essentially a policy decision—to allocate certain funds to state universities *while allowing each school the flexibility to spend its funds as it saw fit*. Kimel Br. at 8 n. 8. Because two universities chose *not* to spend the money on scheduled salary enhancements for long-term faculty members—typically older faculty—the Board of Regents must defend its decision not to mandate how the money must be spent. Consequently, virtually any budget decision—such as spending money on textbooks, libraries, or student aid, rather than faculty pay—could be similarly challenged as having a disparate impact, or could even be alleged as a cover for disparate treatment. Policy choices to eliminate or shrink departments, or to privatize government functions, could likewise be challenged.

The United States turns *Boerne* on its head by suggesting that the intrusion into State activity is minimized or even eliminated because the States, by enacting their own antidiscrimination laws, have "disclaimed any interest in using age" in most employment decisions. U.S. Br. at 51-52. This view puts States in an impossible bind: if States do not act to halt conduct that Congress dislikes, it is more likely that Congress will find predicate violations to exercise its remedial power. But if they do act, that self-correction can justify Congressional abrogation because the interference has a "minimal impact" on State activity. U.S. Br. at 47-48. But surely the States also foreswear intentional patent infringement as a matter of policy, and the States have enshrined protection of the free exercise of religion in their

state constitutions. But these policy choices did not grant Congress power to enact the Patent Remedy Act or RFRA intrude on the theory that it would not change much that the States seek to do.

Perhaps the greatest evidence that States see the ADEA as intrusive is the very fact that States have fought this and similar suits so vigorously. If the money-damages suits had little impact on State activity, and if States cared little if they were sued in State or federal courts, or under State or federal law, then States would not find it worth the effort to fight for this principle. Yet the courts have been full of such resistance by the States, and this very case represents only one of several that have been fought all the way to this Court. By their statements in all of these cases, the States have indicated a collective majority view that ADEA suits intrude upon our immunity.

* * *

Though the *amici* States stand firm in favor of immunity from money-damages suits in federal courts, it must not be forgotten that State and local government employees are still protected from age discrimination. First, and most important, those substantive protections are available in similar or better measure by the States' own laws. *See* Appendix B. And the ADEA itself still applies, as this Court has already held that the ADEA is a valid enactment as applied to the States pursuant to the Commerce Clause, *EEOC v. Wyoming*, 460 U.S. 226 (1983), and the Eleventh Amendment does not protect the States from suit by the federal government, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), as exemplified in part here. Thus, although *Florida Prepaid* and *City of Boerne* require dismissal of the claims in this case, State officials are not

excused from compliance with the ADEA, and State employees are protected from age discrimination.

## CONCLUSION

For all of the above reasons, the *amici* States urge the Court to affirm the judgments below.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and
Reporter of Tennessee
MICHAEL E. MOORE
Solicitor General
Cordell Hull Building
Nashville, Tennessee 27343
(615) 741-3491

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
STEPHEN P. CARNEY*
Associate Solicitor
**Counsel of Record*
MATTHEW J. LAMPKE
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for *Amici* States

Date: August 17, 1999

# APPENDIX A

## STATE LAWS PROTECTING PUBLIC EMPLOYEES FROM AGE DISCRIMINATION IN 1974

| | |
|---|---|
| California | Cal. Gov't Code § 12900 et seq. |
| Connecticut | Conn. Gen. Stat. § 46a-51 et seq. |
| Delaware | Del. Code Ann. Tit. 19 § 710 et seq. |
| Florida | Fla. Stat. Ann. § 112.043 et seq. |
| Illinois | Ill. Rev. Stat. 1973, ch. 48, § 881 et seq. |
| Indiana | Ind. Code Ann. § 22-9-2-1 et seq. |
| Iowa | Iowa Code Ann. § 216.1 et seq. |
| Louisiana | LAS-Const. Art. I, § 3. |
| Maine | Me. Rev. Stat. Ann. tit. 5, § 4551 et seq. |
| Maryland | Md. Cod. Ann. Art. 49B § 1 et seq. |
| Massachusetts | Mass. Gen. Laws ch. 151B § 1 et seq. |
| Michigan | Mich. Comp. Laws § 423.301 et seq. (Repealed in 1977 § 432.303a et seq.) |
| Nevada | Nev. Rev. Stat. § 281.370 |
| New Hampshire | N.H. Rev. Stat. Ann. § 354-A:1 et seq. |
| New Jersey | N.J. Stat. § 52:14-11 (hiring practices only) |

## APPENDIX A

## STATE LAWS PROTECTING PUBLIC EMPLOYEES FROM AGE DISCRIMINATION IN 1974

| | |
|---|---|
| New Mexico | N.M. Stat. Ann. § 28-1-1 et seq. |
| New York | NY Exec Law § 290 et seq. |
| North Dakota | N.D. Cent. Code § 34-01-17 |
| Oregon | OR. Rev. Stat. § 659.010 et seq. |
| Pennsylvania | Pa. Stat. Ann. Tit. 43 § 951 et seq. (Purdon) |
| Rhode Island | R.I. Gen. Laws 28-6-1 et seq.. (Repealed in 1980 by § 28-6-1 et seq.) |
| South Dakota | S.D. Codified Laws § 3-6A-15 |
| South Carolina | S.C. Code Ann. § 1-13-10 et seq. |
| Vermont | Vt. Stat. Ann. tit. 3 § 1001 et. seq. (hiring practices only) |
| Washington | Wash. Rev. Code § 49.60.010 et seq. |
| West Virginia | W. Va. Code § 5-11-1 et seq. |

## APPENDIX B

## STATE LAWS PROTECTING PUBLIC EMPLOYEES FROM AGE DISCRIMINATION

| | |
|---|---|
| Alabama | Ala. Admin. Code r.670-X-4-.01 |
| Alaska | AK Stat §18.80.200 et seq. |
| Arizona | Ariz. Stat. § 41-1461 et seq. |
| Arkansas | AR. Stat. § 21-3-201 et seq. |
| California | Cal. Gov't Code § 12900 et seq. |
| Colorado | Col. Stat. § 24-34-401 et seq. |
| Connecticut | Conn. Gen. Stat. § 46a-51 et seq. |
| Delaware | Del. Code Ann. Tit. 19 § 710 et seq. |
| Florida | Fla. Stat. Ann. § 760.01 et seq. |
| Georgia | G.A. Stat. § 45-19-20 et seq. |
| Hawaii | H.I. Stat. § 378-1 et seq. |
| Idaho | Idaho Code Ann. § 67-5901 et seq. |
| Illinois | Ill. Rev. Stat. 775 5/2-101 et seq. |
| Indiana | Ind. Code Ann. § 22-9-2-1 et seq. |
| Iowa | Iowa Code Ann. § 216.1 et seq. |
| Kansas | KS ST § 44-1111 et seq. |
| Kentucky | KY ST § 344.010 et seq. |

| | |
|---|---|
| Louisiana | LA RS § 23:301 et seq.<br>LSA-Const. Art. I, § 3 |
| Maine | Me. Rev. Stat. Ann. tit. 5 § 4551 et seq. |
| Maryland | Md. Cod. Ann. Art. 49B § 1 et seq. |
| Massachusetts | Mass. Gen. Laws ch. 151B § 1 et seq. |
| Michigan | Mich. Comp. Laws § 37.2101 et seq. |
| Minnesota | MN Stat. § 363.01 et seq. |
| Mississippi | MS Stat. §§ 25-9-103, 25-9-149 |
| Missouri | MO § 213.010 et seq. |
| Montana | Mont. Code Ann. § 49-3-101 et seq. |
| Nebraska | Neb. Rev. Stat. 48-1001 et seq. |
| Nevada | Nev. Rev. Stat. § 281.370 |
| New Hampshire | N.H. Rev. Stat. Ann. § 354-A:1 et seq. |
| New Jersey | N.J. Stat. Ann. § 10:3-1 et seq. |
| New Mexico | N.M. Stat. Ann. § 28-1-1 et seq. |
| New York | NY Exec Law § 290 et seq. |
| North Carolina | Gen. Stat. of N.C. 126-16 and 126-36 |
| North Dakota | N.D. Cent. Code § 14-02.4-01 et seq. |
| Ohio | Ohio Rev. Code. § 4112.01 et seq. |

| | |
|---|---|
| Oklahoma | Okla. Stat. Ann. tit. 25, §§ 1201, 1302 et seq. |
| Oregon | Or. Rev. Stat § 659.010 et seq. |
| Pennsylvania | Pa. Stat. Ann. tit. 43 § 951 et seq. |
| Rhode Island | R.I. Gen. Laws Ann. § 28-5-1 et seq. |
| South Carolina | S.C. Code Ann. § 1-13-10 et seq. |
| South Dakota | S.D. Codified Laws § 3-6A-15 |
| Tennessee | Tenn. Code Ann. 4-21-101 et seq. |
| Texas | Tex. Labor Code Ann. § 21.001 et seq. |
| Utah | Utah Code Ann. 34A-5-101 et seq. |
| Vermont | Vt. Stat. Ann. tit. 21 § 495 et seq. |
| Virginia | Va. Code Ann. § 2.1-116.10 et seq. |
| Washington | Wash. Rev. Code § 49.60.010 et seq. |
| West Virginia | W Va. Code § 5-11-1 et seq. |
| Wisconsin | Wis. Stat. Ann. § 111.19 et seq. |
| Wyoming | Wy. Stat. Ann. § 27-9-101 et seq. |